No. 83-1057

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN DI GILIO,

Petitioner,

-vs-

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether in the context of a motion to correct a judgment an individual has an absolute due process right to an evidentiary hearing where evidence is proffered tantamount to a **prima facie** demonstration that a judgment is inaccurate?

2. Whether due process requires application of a particular burden of proof within a hearing of a motion to correct a judgment rendered in a criminal case and whether the state or the defendant bears the burden?

3. Whether it is unconstitutional to fashion a rule that an ambiguous judgment must be interpreted as reflecting a disposition which comports with law?

4. Whether the State of New Jersey's failure to maintain a signed order of the court or transcripts of a proceeding precludes it from asserting for the first time 26 years after a final disposition that the defendant in a criminal matter was convicted of a crime? And, whether prior conduct of the State over a 26 year period evidencing its view that the matter was downgraded to a disorderly persons offense absolutely precludes it from altering its position to the detriment of the defendant?

5. Whether due process is violated where the State licenses an individual to possess and utilize a hunting weapon over a 26 year period and thereafter institutes a prosecution of the individual for possession of the

weapon on the basis that a handwritten "docket sheet" indicates that the individual was convicted of simple assault in 1954?

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UNITED STATES OF AMERICA,

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in this proceeding on September 21, 1983.

OPINION BELOW

The judgment order of the New Jersey Supreme Court is appended to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the New Jersey Supreme Court is based upon 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fifth and Fourteenth Amenmdments to the United States Constitution.

STATEMENT OF THE CASE

1.

Introduction

This matter presents the Court with an opportunity both to right an obvious injustice and to render an opinion which will clarify the

requirements of due process in the context of motions to correct clerical errors in judgments. The basic injustice in this matter is that an inaccurate, hand-written "docket sheet" recording the disposition of a 1954 indictment has underpinned the return of a 1980 State indictment against petitioner and threatenes additional harm to him. Specifically, the 1980 indictment charges petitioner with possession of a weapon by a previously convicted misdemeanant. The predicate prior criminal conviction is alleged to be the disposition of the 1954 indictment. In truth, petitioner was acquitted of the criminal offense within the indictment and adjudicated a disorderly person on the basis that he utilized loud and offensive language. Disorderly persons

offenses are not considered criminal convictions under New Jersey state laws. See State v. Senno, 79 N.J. 216 (1979).

The nature of the injustice herein is exacerbated by the fact that during the period between 1954 and 1980, the State of New Jersey periodically confirmed that petitioner did not have any prior criminal record. The most salient and direct confirmations was its issuance in the past of a Waterfront Commission license and hunting licenses to petitioner. Such licenses are not granted to individuals previously convicted of a crime. The State of New Jersey also periodically advised the New York Boxing Commission that petitioner has no prior criminal record. That assurance resulted in issuance of several boxing licenses to petitioner. Stated somewhat differently, 26 years after the 1954 disposition, the State of

New Jersey indicted petitioner as the result of his possession of a garden-variety hunting rifle which it on several prior occasions licensed him to possess and utilize for hunting purposes. In this context, we stress that possession of this particular weapon in itself is not an offense, absent some form of legal disability. The net effect of the State's conduct in this case is that through its grant of hunting and other licenses to petitioner it reinforced his reliance upon the view that no dispute existed respecting whether the 1954 indictment was downgraded to a disorderly persons offense. This reliance caused petitioner to believe that the weapon at issue was not proscribed from being within his residence.

Petitioner moved in state court to correct the erroneous "docket sheet" which has facilitated the unfair and baseless prosecution.[1] The New Jersey Law Division (trial court) denied petitioner a hearing because the court previously considered and denied a motion to dismiss the illegal weapons possession indictment, which is predicated upon the erroneous "docket sheet." Despite the fact that the prior challenge to the indictment did not encompass a request to correct the docket sheet, the Law Division applied the "law of the case" doctrine. The motion was denied without a hearing despite the fact that the prosecutor who

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[1] In a related hearing in federal court, the Honorable H. Curtis Meanor, U.S.D.J. commented upon prosecution of Indictment No. 175-80. That court stated "regardless of the merits of the indictment in Hudson County, I think its unfair and a discriminatory prosecution."

represented the State in 1954 was present before the court prepared to unequivocally testify that the matter had been disposed of as a disorderly persons offense. The Appellate division and Supreme Court of New Jersey affirmed the ruling.

The basic issue before this Court is whether petitioner was improperly denied a hearing and whether it is violative of due process and fundamental fairness to prosecute an individual on the basis of conduct which the State of New Jersey previously repeatedly informed him was permissible. In the absence of a decision to enjoin the prosecution altogether, we believe that this Court has an obligation to find that due process requires that petitioner at a minimum be provided a hearing wherein the merits of his claim are considered. As will be demonstrated

by a review of the facts, it was a clear violation of due process to refuse to conduct a hearing.

ii.

Procedural History

On an unascertainable date in 1951, Hudson County Indictment Nos. 720-51 and 721-51 were filed. Both indictments charged petitioner John DiGilio (hereinafter "petitioner") with: atrocious assault and battery in violation of R.S.2:110-1 (Count One) and assault and battery in violation of R.S.2:103-1 (Count Two). On October 27, 1954 non-jury trials commenced as to each indictment before the Honorable Paul J. Duffy, J.C.C. Judge Duffy acquitted petitioner of both crimes charged within Indictment No. 720-51. Petitioner was similarly acquitted of the criminal offenses within 721-51.

However, the court found petitioner guilty of a lesser-included disorderly persons offense within Count Two, based on petitioner's use of offensive language. Thereafter, on November 19, 1954 Judge Duffy imposed the statutory maximum fine for a disorderly persons offense of $175.00 on petitioner and assessed $25.00 in court costs.

In October of 1980, Hudson County Indictment No. 175-80 was filed. That indictment charged petitioner with possession of a weapon by a previously convicted misdemeanant in violation of N.J.S.A. 2A:151-8. Petitioner moved in the Law Division to dismiss Indictment No. 175-80. On May 29, 1981 a hearing was conducted before the Honorable Joseph M. Thuring, J.S.C. On that same day, Judge Thuring denied petitioner's

motion. Both the Appellate Division and Surpeme Court of New Jersey denied petitioner leave to appeal.

On December 14, 1981 petitioner filed a notice of motion to correct the judgment recorded respecting Indictment No. 721-51. On January 21, 1982 Judge Thuring denied a hearing to petitioner and also denied petitioner's motion to correct the judgment. Notice of Appeal was filed on February 5, 1982. On May 10, 1983 the Appellate Division affirmed the trial court's ruling. On September 21, 1983 the Supreme Court of New Jersey denied petitioner's petition for certification.

iii.

Factual Background

a. **Indictment No. 720-51 and 721-51 And Disposition Thereof**

On August 19, 1951 petitioner was involved in an altercation with Elizabeth Moore and her son, John Moore. The altercation stemmed from an automobile accident. John Moore initiated a tussle with petitioner, during which he (Moore) accidentally struck his mother. Petitioner was not the aggressor in the altercation and had no physical contact with Elizabeth Moore. However, petitioner did direct offensive language at her. Hudson County Indictment Nos. 720-51 and 721-51 were returned against petitioner as the result of the incident. Each indictment charged petitioner pursuant to Title 2 with atrocious assault and battery (2:100-1) and assault and battery (2:103-1).

Trial of the indictments commenced on October 27, 1954, three years after the altercation. The trials

were delayed because in the interim witnesses to the incident enlisted in the armed forces and served in the Korean War. On this date, separate non-jury trials were conducted in each case before the Honorable Paul J. Duffy, J.S.C. Petitioner was acquitted of each of the offenses within Indictment No. 720-51. That indictment related to John Moore, whom the court found initiated the physical aspects of the altercation. With respect to Indictment No. 721-51, petitioner was acquitted of atrocious assault and battery (Count One). The simple assault and battery charge (Count Two) was downgraded to a disorderly persons offense. The basis of the downgrading was an adjudication that petitioner utilized offensive language in his verbal interaction with Elizabeth

Moore. Petitioner at the time of trial conceded that he utilized such language.[2]

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[2] In the interim between the filing of the indictments and the trials, Title 2 was repealed and Title 2A enacted. Within Title 2A assault and battery was downgraded to a disorderly persons offense. Nevertheless, **N.J.S.A. 2A:169-2b** provided that "[o]ffenses committed prior to January 1, 1952 which were not at the time of their commission punishable under this subtitle [Disorderly Persons] shall be prosecuted and punished as provided by law in effect at the time of the commission." **Cf. N.J.S.A. 1:1-15; State v. Low, 18 N.J. 179, 187 (1955).** However, a disorderly persons offense existed within Title 2, **viz. R.S. 2:202-7** (using loud and offensive language), which facilitated downgrading of the offense. And, a more salutary development than the enactment of Title 2A made the downgrading possible within the trial before Judge Duffy. Specifically, the Law Division opinion in **State v. Chiarello, 31 N.J. Super. 482 (Cty. Ct. Div. 1954), rev'd 17 N.J. 36 (1954),** held that it was permissible for a county court judge to downgrade an indictable offense to a disorderly persons offense within the context of trial of the indictable. Prior to the county court opinion in **Chiarello,** disorderly persons offenses were required to be handled entirely within a municipal court. The county court opinion in **Chiarello** was in effect at the time of petitioner's 1954 trial.

Petitioner appeared before Judge Duffy on November 19, 1954 for sentencing. The court imposed a fine of $175.00, the maximum fine for a disorderly persons offense, and $25.00 in court costs. No other form of sanction was imposed. Because petitioner conceded that he directed obscene language at Moore and this disposition would not affect his ability to secure boxing licenses, no appeal was filed.

b. The State's 26 Year Period Of Acquiescence In The View That Indictment No. 721-51 Did Not Result In A Criminal Conviction

During the period between the 1954 disposition and September of 1980, a time span of approximately 26 years, the State frequently verified that

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That opinion was reversed subsequent to trial. The thrust of that opinion was ultimately reinstated in State v. Saulnier, 63 N.J. 199, 207-208 (1973).

petitioner was adjudicated a disorderly person as opposed to convicted of a crime. The State's verification was in the form of its clearance of petitioner to participate in activities prohibited to individuals previously convicted of a criminal offense. For example, the State of New York continued to grant boxing licenses to petitioner subsequent to inquiries of the State of New Jersey as to whether petitioner was previously convicted of a crime. Petitioner also was enlisted as a member of the Coast Guard and secured employment within an area regulated as part of national security during the Korean War. And, he testified in 1970 as a defendant in a criminal trial in New Jersey with no fear of impeachment since he and the State prosecutor were of the view that he had no criminal record. Furtherrore, it is highly probative that the State of

New Jersey issued hunting licenses to petitioner. Such a license is a permit to possess and utilize a weapon for sporting purposes.

c. **Indictment No. 175-80 And The Motion To Dismiss It**

On July 12, 1978, agents of the Federal Bureau of Investigation conducted a search in Secaucus, New Jersey of a premises occupied by petitioner. During the course of the search, a garden variety hunting shotgun was seized from within the premises. Thereafter, in September of 1980, a full 27 months after the agents' search, a state as opposed to federal indictment was filed against petitioner. The indictment charged him with possession of a weapon by a previously convicted misdemeanant. The indictment alleged that the predicate misdemeanor (crime) was the disposition of Indictment No.

721-51. Succinctly stated, 26 years after disposition of Indictment No. 721-51 and petitioner's participation in highly-regulated activities and possession of hunting weapons with governmental consent, the State retrenched on its earlier position and asserted a claim that petitioner had a criminal record. The basis of the prosecution was an inaccurate record which failed to reflect the downgrading of the indictment to a disorderly persons offense. The sole record of the disposition maintained by the Hudson County clerk is the hand-written notes of a court clerk which erroneously states that "...being tried by the court Defdt is found Guilty on 2d Count of this Indictment." No signed order of the court has been produced. Preparation of

such an order was specifically required by R.R.4:55-3, which was applicable in 1954.

Petitioner moved to dismiss the weapons possession indictment in May of 1981. Counsel argued **inter alia** that petitioner in 1954 was adjudicated guilty of a disorderly persons offense and therefore was not proscribed from possessing a hunting rifle. Counsel made no argument specifically directed at correction of the record of disposition. All arguments related exclusively to dismissal of the indictment. The court denied petitioner's motion.

In its ruling, the court did not address the validity of the "docket sheet." The court presumed that it was accurate. And, the court miscategorized the hand-written "docket sheet" as being a certified copy of the judgment.

d. **Petitioner's Motion To Correct The Judgment**

On December 14, 1981 petitioner filed a motion to correct the erroneous record relating to Indictment No. 721-51. The motion was filed as part of the proceedings pertaining to Indictment No. 721-51 and bore no relationship to the pending indictment (Indictment No. 175-80). The basis of the motion to correct was that documentary evidence and witnesses would demonstrate that the record should be corrected to reflect the downgraded disposition. In fact, petitioner had ready 12 witnesses who would provide relevant testimony, including the prosecutor who represented the State at the trial of Indictment No. 721-51. The prosecutor had filed an affidavit which stated:

> The Court remarked that the testimony disclosed that there

> was some offensive language used during the incident to which the defendant John DiGilio admitted...
>
> * * *
>
> The defendant was found guilty of a downgraded offense on Count Two of Indictment No. 721 under the Disorderly Persons Act for assault committed by use of offensive language.

The court denied petitioner a hearing . The court erroneously ruled that the motion was part of the proceedings pertaining to Indictment 175-80 and applied the "law of the case doctrine."

iv.

The Opinion Of the Appellate Division Which In Effect Was Adopted By The Supreme Court Of New Jersey

The Appellate Division affirmed the decision of the trial court. The panel ruled both that petitioner was properly denied a hearing of his motion for correction of the judgment pertaining to Indictment No. 721-51 and that he, in fact, was convicted of a crime in 1954. With respect to denial of a hearing, the trial court had ruled that the "law of the case doctrine" precluded such a hearing since the court previously issued a ruling as to petitioner's prior criminal record as part of motions relating to Indictment No. 175-80. In reviewing that particular portion of the decision, the Appellate Division stated that "technically the law of the case doctrine is inapplicable," since the prior motions were directed to the 1980 indictment and not the 1951 indictment. The Appellate Division, however,

substituted the doctrine of equitable estoppel and affirmed the denial of a hearing.

The panel also fashioned an opinion respecting the merits of petitioner's claim that the judgment was inaccurate. The Court stated that it was convinced that no mechanism existed in 1954 to facilitate downgrading of the offense from an indictable offense to a disorderly persons offense. Therefore, stated the Court, petitioner of necessity was convicted of a crime. In practical effect, the Appellate Division stated that Judge Duffy would have been in error had he downgraded the offense and the court would, thus, presume that no such downgrading transpired. The Appellate Division expressed no concern respecting the failure of the State to maintain a signed order of the court or

other judicial record.[3] The Supreme

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[3] The Appellate Division's opinion is based upon an incorrect assumption. the Court stated "the State and defendant indicate agreement that the statute implicated was R.S.2:103-1." We do not concede this issue. In the context of an evidentiary hearing, it might well have been determined that the matter was downgraded to R.S.2:202-7 (Title 2 disorderly persons offense of uttering loud and offensive languge) as opposed to 2A:170-26 (Title 2A disorderly persons assault). No hearing was conducted and in the absence of a judicial order, events must be reconstructed on the basis of examination of the witnesses. Particularly, the prosecutor who represented the State adamantly maintains that the matter was downgraded to a disorderly persons offense which encompassed usage of offensive language. His affidavit does not incorporate any statutory citation as to the offense to which the count was downgraded. We stress that the Appellate Division in its opinion incorrectly states that "none of the affidavits state that the trial judge found defendant guilty of uttering loud and offensive language." The affidavit of the prosecutor specifically refers to use of offensive language. Similarly, as part of its analysis, the Appellate Division relied upon what it perceived to be a $200.00 fine which was imposed upon petitioner. The statutory maximum fine for a disorderly persons offense was $175.00. This latter element of reliance was incorrect since the $200.00 amount imposed upon petitioner reflected a

Court of New Jersey refused to disturb affirmance of the decision to deny petitioner a hearing.

$175.00 fine (the statutory maximum) and $25.00 in court costs.

Reasons For Granting The Writ

POINT I

CERTIORARI SHOULD BE GRANTED TO ESTABLISH CONSTITUTIONALLY-BASED GUIDELINES AS TO THE NECESSITY FOR AND NATURE OF HEARINGS TO CORRECT INACCURATE JUDGMENTS RENDERED IN CRIMINAL CASES WHICH WRONGLY THREATEN AN INDIVIDUAL's FUTURE LIBERTY AND ALSO TO DETERMINE WHETHER A HEARING WAS PROPERLY DENIED HEREIN

The primary issue before this Court is whether petitioner was improperly denied a hearing of his motion to correct the inaccurate judgment which has been misutilized in a fashion infringing upon his liberty, viz. to underpin a discriminatory prosecution and to chill his everyday activities. As part of its consideration of that issue, this Court should construct an opinion which closes the precedential void respecting whether the

Constitution requires application of a particular burden of proof in such hearings and upon which party it imposes that burden. We submit that petitioner was improperly denied a hearing. The basis for our view is that the State courts deprived him of the opportunity to present clear and unassailable evidence that the judgment was inaccurate. Those courts utilized an ambiguous hand-written "docket sheet" as conclusive proof of a prior conviction of crime. We stress that the presumed accuracy of the "docket sheet" was the basis of denial of a hearing. Petitioner was absolutely entitled to a hearing. We further submit that with respect to motions to correct judgments in criminal cases, the State must bear the burden of proving that a particular judgment is, in fact, accurate. Placement of the burden upon the State is the only fair

rule of law since the State has a legal obligation to maintain accurate criminal history record information. See **Federal Crime Control Act of 1973, §524(b); 28 C.F.R., Chapter I, Part 20.** Use in the instant case of an inaccurate "docket sheet" to underpin a criminal prosecution, which was not supported by any order of the court, is exemplary of the necessity that the State be required to maintain accurate judgments and orders in support of the judgments. And, the sole means to ensure that such documents will be maintained is to fashion a penalty for failure to do so.

i.

An Individual Has An Absolute Right To An Evidentiary Hearing Where Evidence Is Proffered Tantamount To A Prima Facie Demonstration That A Judgment Is Inaccurate

Petitioner proffered evidence, including the testimony of the prosecutor who represented the State, which indicated that the "docket sheet" maintained respecting disposition of Indictment No. 721-51 was inaccurate. Petitioner also proffered licenses which the State granted him for which he would have been ineligible in the event that the docket sheet was accurate. The trial court refused to conduct a hearing and, in effect, stated that the hand-written "docket sheet" in itself conclusively indicated that petitioner was convicted of a criminal offense. The State did not proffer any evidence establishing the accuracy of the "docket sheet." It merely offered the sheet itself. No order or judgment signed by Judge Duffy has been forthcoming and it has apparently been lost by the State.

In affirming the trial court's decision, the Appellate Division stated that any downgrading of the assault offense would have constituted error and, thus, it would presume that no such downgrading occurred. In short, the Appellate Division established an irrebuttable presumption that an ambiguous "docket sheet" must be interpreted as a disposition that comports with law. The Supreme Court of New Jersey refused to disturb that ruling. Clearly, the lower courts erred. With particular respect to the position that the absence of error in the docket sheet must be presumed, such logic is plainly irrational since appellate courts were formed out of the understanding that error is not uncommon. And, mechanisms of a continuing nature must exist to

facilitate correction of error whenever it is identified. See, Fed.R.Crim.Proc. 36(a); Fed.R.Civ.Proc. 60(a).

Under New Jersey state law, correction of clerical errors within judgments is governed by R.1:13-1. The rule provides that errors in a judgment or the record arising from oversight or omission may at any time be corrected by the trial court, upon its own initiative or on motion of any party. In re Newark Teachers' Assn., 95 N.J. Super. 117 (App. Div. 1967). This rule is purported to apply to judgments entered in criminal or penal matters. Thus, consistent with what we perceive to be the demands of due process, New Jersey court rules embody a mechanism designed to facilitate correction of error in a judgment whenever it is identified. State v. Connors, 129 N.J. Super. 476, 484 (App. Div. 1974), is instructive in

this regard. In **Connors**, the Appellate division emphatically endorsed the principle that an error in a judgment caused by mistake can be corrected at any time. **Connors** involved a quasi-criminal proceeding. **Cf. Wicks v. Central R. Co.**, 129 N.J. Super. 145, 149 (App. Div. 1974). (Clerical error may be corrected at any time); **Lakewood Township v. Block**, 251, 48 N.J. Super. 581, 591 (App. Div. 1958) (Court may correct a clerical error by amendment without a rehearing and without reviving a right theretofore barred).

This principle, permitting correction of a clerical error at any time, is not supported exclusively by the rules which guide New Jersey courts. It has been stated that a New Jersey state court is possessed of the inherent power to control its own judgments independent of the formal rule. **Welser**

v. Welser, 54 N.J. Super. 555, 563-564 (App. Div. 1959). In this context, it is axiomatic that a court has the power to amend a record which misstates the real verdict or a judgment which misstates the court's opinion. Terminal Cab Co. v. Mikolasy, 128 N.J.L. 275, 277 (Sup. Ct. 1942); Delker v. Freeholders of Atlantic, 90 N.J.L. 473, 475 (E. & A. 1917). And, it is equally clear that a judicial as opposed to clerical error in entering a judgment caused by mistake can be corrected by the court at any time. King v. Ruckman, 22 N.J.Eq. 551 (E. & A. 1871).[4]

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[4] Other jurisdictions, both federal and state, of necessity as a matter of fairness recognize the right of an interested party to have the appropriate record, judgment or order accurately reflect the final disposition of the case. In O'Brien v. New York Edison Co., 26 F.Supp. 290 (S.D.N.Y. 1939), the court noted that if the judgment fails to set forth the court's determination of the prior suit with sufficient accuracy, "it is the privilege of the plaintiff to move for amendment of the

The duty of a New Jersey state court to rectify any errors or omissions in the record is also made clear by the rule that "an order which has no basis in any record of the court making the order, or in documents filed with that court that may be made into a record, is a mere nullity." Stephenson v. Stephenson, 112 N.J. Super. 531 (Ch.Div. 1970); In re Ryan's Estate, 130 N.J.Eq. 380, 381 (Prerog. 1941). In Stephenson v. Stehenson, supra, the court found that no judicial order had ever been formally entered in the prior adjudication of the case, and held that

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judgment to procure such relief as the law affords." Id. at 292. Similarly, in Cazell v. Cazell, 3 P.2d 479 (Kan. 1931), the court stated that "no lapse of time, however long, will preclude the correction of the judgment roll so as to make it speak precisely what the court intended." Id. at 481. See Fed.R.Crim.Proc. 36; Johnson v. Mabry, 602 F.2d 167 (8 cir. 1979); United States v. Jones, 608 F.2d 386 (9 Cir. 1979).

"the failure to submit a formal written order in the case of any determination is at the risk of the parties being unable later to move with respect thereto or to appeal therefrom." **Id. at 533. Cf. Fed.R.Crim.Proc. 32(b)(11)** (The judgment shall be signed by the judge and entered by the clerk). Thus, the foregoing demonstrates that present New Jersey jurisprudence respecting correction fo judgments is clear with regard to the right to an accurate judgment. However, no judicial precedent exists respecting the procedures applicable to the filing of a motion and the circumstances under which a hearing must be conducted. The problem in the instant case stems from the situation identified in **Stephenson v. Stephenson, supra.** Specifically, the State has not maintained a formal written order and now requests that a grand jury, court

and petit jury accept a handwritten "docket sheet" as proof that petitioner was previously convicted of a crime. See Fed.R.Crim.Proc. 32(b)(1). Worse yet, however, is the fact that the courts of New Jersey have permitted the State to proceed in this fashion. This is a blatant violation of due process.

We submit that the instant matter is an appropriate case in which to fashion guidelines for the conduct of evidentiary hearings as part of motions to correct judgments for application uniformly within the State and federal system. In this context, we assert that it is clear that any form of fair circumscription of the law in this area must encompass extension of a hearing in the circumstances present herein. Of necessity any rule fashioned by this Court must repose the grant of a hearing within the discretion of the trial

judge. The discretion exercised below was the product of a failure to consider all relevant factors and a clear error in judgment. The State courts relied upon the "docket sheet" but gave no consideration as to whether the document was accurate. We iterate that it was presumed to be accurate. Those courts adopted the position that it must be presumed that the ambiguous "docket sheet" reflected a disposition which comported with law. And, since the State courts believed that downgrading of the offense was not legally proper, it would presume that no such downgrading occurred.[5]

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[5] We stress that an error of the court in downgrading the offense, if such error occurred, is not ground to now substitute a conviction of crime for an adjudication of a disorderly persons offense. If the downgrading was illegal, we submit that the State's 26 year acquiescence in such a disposition bars it from seeking any alteration in the disposition at this juncture. See Point II, infra. And, in the absence of some

Simply put, in denying petitioner a hearing, the state courts ignored the proffer as to the contemplated testimony of individuals present at the time the disposition was rendered and gave no consideration whatsoever to prior acts of the State verifying that petitioner had no criminal record. Thus, each of the courts below committed clear errors in judgment in reaching the conclusion that petitioner was not entitled to a hearing. See **United States v. DiPasquale**, 677 F.2d 355, 356-359 (3 Cir. 1982) (An ambiguous state court judgment may not be presumed nor interpreted to establish the predicate

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order of the court or other reliable document such as a transcript, the state courts may not undo the pattern of petitioner's life on the basis of an ambiguous "docket sheet."

felony under federal statute making it a crime for a convicted felon to possess a firearm).

In the instant case, petitioner has not had even a bare semblance of a full and fair opportunity to litigate the issue of accuracy. Subsequent to the motion to dismiss the indictment wherein the accuracy of the "docket sheet" itself was challenged, petitioner marshalled 12 witnesses and much documentary evidence corroborative of his view that the "docket sheet" is inaccurate. The state courts refused to rule that he was entitled to have the accuracy of the recollections of his witnesses and the legitimacy of his documentary evidence weighed against the notations within the hand-written "docket sheet." The opportunity which we seek is to gain the day in court to

which we are entitled. For some inexplicable reason, the state courts have resisted a full and fair hearing.

In sum, petitioner was absolutely entitled to a hearing of his motion to correct the judgment. This Court must grant certiorari and reverse the decision below. See **United States v. DiPasquale, supra at 359** (Extrinsic evidence is admissible to prove the accuracy or inaccuracy of an ambiguous state court judgment). Due process demands no less.

ii.

In The Context Of A Colorable Motion to Correct A Judgment Rendered In A Criminal Case The State Must Bear The Burden Of Proof Respecting The Accuracy Of A Judgment

The State of New Jersey has a legal obligation, imposed by State and Federal regulations, to maintain accurate and complete criminal history

record information. See 28 C.F.R. Chapter I, Part 20; R.R.4:55-3; R.4:42-1(a). Inaccurate criminal history record information has the capacity to cause great detriment to an individual in his enjoyment of life and liberty, e.g. voting rights, employment opportunities and general reputation within the community. The federal regulations to which the State of New Jersey must adhere are premised upon an awareness of this impact upon liberty. It is our considered view that whenever a colorable challenge is raised to the accuracy of a judgment rendered in a criminal case, the State must bear the burden of proof with respect to accuracy. In circumstances where the State has maintained appropriate records, it will meet its burden without undue expenditure of resources. The State must merely produce a certified

signed order of the court which was reviewed by both parties prior to its filing. Placement of the burden upon the State is the singularly fair result since in every case where a negative consequence is sought, the State will be the party requesting that result.

The instant matter is an example of the potential and actual dangers attendant to dissemination of inaccurate information. Although it was required by law to maintain a signed order of the court reflecting the 1954 disposition, the State has failed to do so. R.R.4:55-3. And, it has proffered an unsigned, hand-written "docket sheet" as proof that petitioner was previously convicted of a crime. More importantly, that document in itself has been used to underpin a 1980 prosecution of petitioner. The conduct of the State in this case and the lower court's

tolerance of it is an affront to the dignity of the judicial process and general notions of the orderly and fair administration of the criminal justice system.

With regard to the opinion of the Appellate Division, that court affirmed the trial court's decision absent any intimation as to what it perceived to be the appropriate burden of proof. We are unable to decipher in legal terms the definition of "a strict burden of proof." In any event, that court placed the burden on petitioner. In **United States v. DiPasquale, supra**, the Third Circuit issued a warning to law enforcement agencies that ambiguous judgments will not suffice in prosecutions where the judgment is proffered as establishing the predicate felony prerequisite to liability within a disability-based criminal statute. The

DiPasquale Court further stated that extrinsic evidence which supports particular interpretations of the judgment will not suffice. 677 F.2d at 358-359. The Court in **DiPasquale** essentially ruled that law enforcement agencies bear the burden of conclusively establishing the nature of a disposition. 679 F.2d at 359. The **DiPasquale** Court stated that where the evidence adduced to interpret the judgment is compatible with more than one interpretation, any finding must be in favor of the challenge to the judgment. Id.

This Court must definitvely rule that the correct posture is to place the burden on the State in the context of motions to correct judgments. Justice and fairness demand no less.

POINT II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE'S CONDUCT IN CORROBORATING OVER A 26 YEAR PERIOD THAT A NON-CRIMINAL DISPOSITION WAS EFFECTED AS TO INDICTMENT NO. 721-51 PRECLUDES IT NOW AS A MATTER OF DUE PROCESS AND FAIRNESS FROM ALTERING THAT POSITION TO THE DETRIMENT OF PETITIONER.

Throughout the period between the 1954 disposition of Indictment No. 721-51 and 1980, the State of New Jersey verified that petitioner was not previously convicted of any crime and suffered no disability respecting lawful possession of a firearm. The State, in fact, granted petitioner hunting licenses and thereby authorized his possession and use of a hunting weapon for particular purposes. Thereafter, the State seized such a weapon from

within petitioner's residence and initiated a prosecution of petitioner for its possession. We believe that the State's actions are violative of due process. This Court should grant certiorari and determine whether due process precludes modification to petitioner's detriment of the position which the State adopted throughout the 26 year period between 1954 and 1980. Indeed, it is our considered view that any concept of justice mandates intervention by this Court into this matter to establish some standard of law as to the instant conduct by the State of New Jersey to the extent that it may have induced a violation of law. Petitioner herein clearly reasonably relied upon an administrative order or grant of permission in possessing the weapon. Prosecution or any infringement

of his liberty in this circumstance is fundamentally unfair and violative of due process.

We submit that due process estops the State of New Jersey from challenging petitioner's motion to correct the judgment. In administratively issuing hunting and other licenses, the State in the past conceded that petitioner had no prior criminal record. Indeed, the State went so far as to acknowledge in a criminal trial in 1970 that petitioner had no prior record and could testify without fear of impeachment. Surely had the State believed that petitioner was previously convicted of an assault, it would have exhibited a lustful desire to infect the jury's consideration of the case with this negative information.

This Court as the ultimate guardian of constitutional rights must condemn the conduct herein.

In **United States v. Clark**, 546 F.2d 1130, 1135 (5 Cir. 1977), the Fifth Circuit specifically advised governmental agencies within its jurisdiction that "the government may not actively mislead someone by authoritatively assuring him that an action is proper and, then, prosecute him for that action." The **Clark** Court relied upon this Court's opinions in **Raley v. Ohio**, 360 U.S. 423 (1959) and **United States v. Laub**, 385 U.S. 475 (1967). The **Raley** Court stated that "to sustain [such prosecutions] would be to sanction an indefensible sort of entrapment." 360 U.S. **supra** at 426. Similarly, the Court in **Laub** stated that "citizens may not be punished for actions undertaken in good faith

reliance upon authoritative assurance that punishment will not attach." 385 U.S. supra at 486. An authoritative assurance is in effect justification to act. Conduct which is justified is legal conduct. United States v. Winston, 558 F.2d 105, 109 (2 Cir. 1977). Cf. United States v. Alessi, 536 F.2d 978, 980-981 (2 Cir. 1976).

In sum, due process considerations preclude the State from retrenching on its earlier position. This Court must so rule. Only in this fashion will justice be served.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari.

Respectfully submitted,

ALAN DEXTER BOWMAN
STEVEN H. GIFIS
ATTORNEYS FOR PETITIONER

DATED: December 20, 1983

Appendix

SUPREME COURT OF NEW JERSEY
0-98 SEPTEMBER TERM 1983

STATE OF NEW JERSEY, Plaintiff-Respondent,	*	21,450
v.	*	ON PETITION FOR CERTIFICATION
JOHN DIGILIO, Defendant-Petitioner.	*	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2350-81T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, presiding Justice, at Trenton, this 20th day of September, 1983.

Clerk

SUPREME COURT OF THE UNITED STATES

No. A-403

JOHN DiGILIO ,

Petitioner,

v.

NEW JERSEY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 20, 1983.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 28th
day of November, 1983.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE
ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2350-81T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN T. DIGILIO,

Defendant-Appellant.

Submitted May 10, 1983-Decided May 25, 1983
Before Judges Fritz and Joelson.

On appeal from Superior Court, Law Division, Hudson County.

Alan Dexter Bowman and Steven H. Gifis, attorneys for appellant (Mr. Gifis and Michael C. Querques of counsel; Mr. Gifis and Mr. Bowman on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent (Jack J. Zappacosta, Deputy Attorney General, of counsel and on the letter brief).

PER CURIAM

In 1951, a Hudson County grand jury returned a two-count indictment against defendant. The first count charged that on August 19, 1951, defendant committed an atrocious assault and battery on Elizabeth Moore contrary to R.S.2:110-1. The second count charged defendant with simple assault and battery on the same woman on the same date as alleged in the first count. Although there was no reference in count two to the statute alleged to have been violated, the briefs submitted on behalf of the State and defendant indicate agreement that the statute implicated was R.S.2:103-1. For unexplained reasons, the case was not brought to trial until October 27, 1954, at which time defendant consented to be tried by a judge without a jury.[1]

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[1] By consent, the indictment was consolidated for trial with another indictment against defendant, the nature

The official records of the clerk of Hudson County contain a hand written page (referred to in defendant's brief as a "docket sheet") dealing with the history of the indictment against defendant from the time of arraignment to the time of sentence. Although the identity of the person who prepared that page has not been positively disclosed, it was apparently a court clerk. At any rate, the handwritten page has been certified by the Clerk of Hudson County as "...a true and correct copy of proceedings in the case of the State of New Jersey -vs- John DiGilio for the charge of Assault & Battery in violation of R.S.2:110-1-Indictment No. 721,1951 term." Included in the page is the following long-hand notation:

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of which has not been divulged to us. Defendant was found not guilty on that indictment.

> Oct. 27/54 By consent of both counsel, court permits trial of this indictment simultaneously with Ind. No. 720, Term 51, and defendant having waived trial by jury and being charged he again pleaded not guilty as charged and being tried by the court defendant is found guilty on 2nd count of this indictment and he is continued on parole % probation officer for sentencing Nov. 19/54.
> Judge Duffy

In 1980, following a search by the Federal Bureau of Investigation, during the course of which a shotgun was seized in premises occupied by defendant, a Hudson County grand jury returned an indictment against him for violation of N.J.S.A. 2A:151-8, which made it a misdemeanor for any person convicted of certain crimes, including assault, to possess a firearm. Defendant's counsel then made a motion to dismiss the indictment, evidently on the ground that in 1954 he was not convicted of a crime, but a disorderly

person offense.[2] Being unsuccessful in such motion, he sought leave from us for an interlocutory appeal, which we denied, and which denial the Supreme Court refused to disturb. Defendant next filed a motion for correction of the record relating to his 1954 conviction and seeking a plenary hearing. This is his appeal from the trial court's denial of that motion. We affirm.

The trial judge based his rejection of defendant's motion on the "law of the case" doctrine. In doing so, he pointed out that in previously denying the motion to dismiss the indictment, he had dealt with defendant's contention that his 1954 conviction had been only for a disorderly person offense. Since that prior motion was addressed to the 1980

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[2] The motion is not included in defendant's appendix. See 2:6-1(a)(7).

indictment whereas the motion to correct the record was addressed to the 1954 indictment, technically the "law of the case" doctrine is inapplicable. That doctrine "...applies only to the decision regarding a question of law or fact made during the course of the same litigation..." State v. Powell, 176 N.J. Super. 190, 195 (App. Div. 1980), certif den. 87 N.J. 333 (1981). However, we are persuaded that another tenet, i.e., equitable estoppel, applies to the second motion. That doctrine "...bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." State v. Gonzales, 75 N.J. 181, 186 (1977). Defendant contends that the trial court's earlier ruling should not serve as a bar to his present motion because there is a more stringent burden

of proof needed to dismiss an indictment than to correct a record. It is true that an indictment should not be dismissed "except on the clearest and plainest grounds." State v. Porro, 175 N.J. Super. 49, 51-52 (App. Div. 1980). However, a strict burden of proof should also be applied regarding an application to change an official record indicating that a defendant has been convicted of a crime so as to reflect a conviction of a disorderly person offense instead. Irrespective of this, equitable estoppel as to the second motion is posited not on the earlier determination that the indictment should not have been dismissed, but on the same issue decided in the latter motion respecting the nature of the 1951 indictment. The canon of proof respecting that issue is the same in any case.

Nevertheless, we shall now proceed to a discussion of defendant's appeal insofar as it deals with the merits of the trial court's dismissal of the motion for a correction of the record and a plenary hearing on that issue. Referring to the affidavit of former assistant prosecutor, Leon Miroff, submitted in support of defendant's motion, we observe the statement that "[t]he defendant was found guilt of a downgraded offense on count two of indictment 721 under the Disorderly Persons Act for assault committed by the use of offensive language." (Emphasis added). The affidavit of a court attendant, Anthony Ippolito, states that he recalls the defendant "...being found guilty of the second count of indictment 721 charging simple assault and battery because he admitted to using offensive language."

He then added that the trial judge "...downgraded the charge to a disorderly person's charge after having heard arguments..." Furthermore, the affidavit of Joseph Soriero states that he was present when defendant "...was found guilty of the second count of indictment 721 charging assault and battery after Judge Duffy had downgraded this charge to a disorderly persons's charge."[3]

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[3] Mr. Soriero's affidvit states "...I attended the trial of John DiGilio at the request of a member of Mr. DiGilio's family who was a member of his political organization at the time." The affidavit which is on the stationary of defendant's attorney at the time, John P. Russell, goes on to state that because of his close association with Judge Duffy, Soriero "...was requested by John P. Russell, Esq., to speak with the Judge as to his recollection of the within matter." The affidvit then states that Soriero visited Judge Duffy who told him that he had downgraded the charge from assault and battery to a disorderly person offense. We do not here pass upon the propriety of counsel's action. However, we are puzzled as to why, rather than relying on patent hearsay, counsel did not

Assuming the credibility of these affiants and conceding their remarkable gift of total recall a quarter of a century after the events they now remember, we are satisfied that their affidavits indicate that there was no need for a plenary hearing. Accepting these affidavits as credible, we find that they indicate that defendant was convicted of assault or of assault and battery committed on August 19, 1951. As we shall soon discuss,this means that defendant was convicted of a crime. When a defendant has been convicted of a specific offense which is a crime, a judge is not empowered to overrule the Legislature by "downgrading" that crime to a disorderly person offense. It must be kept in mind that none of the

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obtain an affidavit from the judge himself. See R.1:6-6. We understand that the judge has since died.

affidavits state that the trial judge found defendant guilty of uttering loud and offensive language, which was constituted a disorderly person offense by R.S. 2:202-7.

We must consider the time frame of the offense charged in the 1951 indictment along with the time that the offense of assault or assault and battery was reduced from a misdemeanor to a disorderly person status. The statute in effect on August 19, 1951, the time of the offense, was R.S.2:103-1. That section provided in part that "[a]ssaults, batteries..and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors." Effective January 1, 1952, Title 2 of the Revised Statutes was replaced by Title 2A which in N.J.S.A. 2A:170-26 provided that

"[a]ny person who commits an assault or an assault and battery is a disorderly person." Defendant's trial and sentence took place in 1954. However, N.J.S.A. 2A:169-2b provided that "[o]ffenses committed prior to January 1, 1952, which were not at the time of their commission punishable under this subtitle [Disorderly Persons] shall be prosecuted and punished as provided by law in effect at the time of the commission." Furthermore, R.S.1:1-15 provided that "[n]o offense, committed, and no liability, penalty or forfeiture, either civil or criminal, incurred previous to the repeal or alteration of any act or any part of any act by the enactment of the Revised Statutes or by any act heretofore or hereafter enacted shall be discharged, released or affected by the repeal or alteration of the statute under which such offense,

liability, penalty or forfeiture was incurred..." This statute, R.S.1:1-15, was "....expressly made applicable to Title 2A by L.1951, c 344, sec 10." State v. Low, 18 N.J.179, 187 (1955).

Therefore, it is clear that a person who committed an assault or an assault and battery in 1951 was required to be regarded as having been convicted of a misdemeanor and sentenced as such even though that conviction and sentence did not occur until 1954. Additionally, since the fine of $200 imposed on defendant exceeded the maximum fine of $175 fixed by R.S. 2:205-1 which was in effect at the time of defendant's offense, it may be argued that the trial judge thereby indicated an intention not to treat defendant as a disorderly person. At any rate, the judge lacked the authority to sentence defendant

except as having been convicted of a misdemeanor since the conviction was for assault or assault and battery.

Affirmed.